Supreme Court, U.S.
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No. 01-353

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

LINZ AUDAIN,

Petitioner,

v.

THE AMERICAN UNIVERSITY, AND
AMERICAN UNIVERSITY,
WASHINGTON COLLEGE OF LAW LAW,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Reply to Opposition

H. Vincent McKnight, Jr., Esq.
2000 L Street, N.W., Suite 400
Washington, D.C. 20036
(202) 783-6400
Counsel of Record &
Counsel for Petitioner

14pp

TABLE OF CONTENTS

Page

REPLY TO OPPOSITION.....1

I. THE OPPOSITION FILED BY THE UNIVERSITY DOES NOTHING TO ALTER THE CONCLUSION THAT THE LITERAL AND DE FACTO STANDARDS APPLIED BY THE DISTRICT COURT IN THIS CASE ARE STANDARDS THAT CONFLICT WITH THE STANDARDS ANNOUNCED BY THIS COURT.1

II. THE UNIVERSITY CANNOT SUCCESSFULLY DISTINGUISH THE STANDARD OF *Reeves* AS CONSTRUED BY THE CASES OF *Blow* AND *Chuang*.....4

III. THE UNIVERSITY MAY HAVE WAIVED ITS OBJECTION TO DR. AUDAIN'S CLAIM THAT HE WAS PREVENTED FROM CONDUCTING DISCOVERY BY FAILING TO OBJECT TOTHE APPLICATION OF THE DOCTRINE OF SPOLIATION TO THE CASE AT BAR.....6

IV. THE COURT SHOULD RELY ON DR. AUDAIN'S STATEMENT OF FACTS BECAUSE THE UNIVERSITY'S STATEMENT OF FACT CONTAINS TOO MANY MISSTATEMENTS OF FACT.....8

CONCLUSION.....10

TABLE OF AUTHORITIES

Cases **Page**

Agostini v. Felton, 521 U.S. 203 (1997).....2

Aka v. Washington Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998) (*en banc*).....3

Blow v. City of San Antonio, 296 F.3d 293 (5th Cir. 2001)....5

Browder v. Director, Dep't of Corrections, 434 U.S. 257 (1978).....2

Chuang v. University of California Davis, 223 F.3d 1115 (9th Cir. 2000).....5

Hormel v. Helvering, 312 U.S. 552 (1976).....7

Lawrence v. Chater, 516 U.S. 163 (1996).....3

Miller v. French, 530 U.S. 327 (2000).....2

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000).....1, 3, 4, 7

Sears v. Mackey, 351 U.S. 427 (1956).....1

Singleton v. Wulf, 428 U.S. 106 (1976).....7

United States v. Gagnon, 470 U.S. 522 (1985).....7

United States v. The Schooner Peggy 5 U.S. (1 Cranch) 103 (1801).....1, 2, 3

Miscellaneous **Page**

Rules of the Supreme Court
Rule 10 c).....2
Rule 15. 2.....6

Federal Rules of Civil Procedure
Rule 50.....4
Rule 54 (b).....1
Rule 56.....4
Rule 60(b)(6).....1, 2

I. THE OPPOSITION FILED BY THE UNIVERSITY DOES NOTHING TO ALTER THE CONCLUSION THAT THE LITERAL AND DE FACTO STANDARDS APPLIED BY THE DISTRICT COURT IN THIS CASE ARE STANDARDS THAT CONFLICT WITH THE STANDARDS ANNOUNCED BY THIS COURT.

In its Opposition to Dr. Audain's Petition for Writ of Certiorari ("Opposition"), the University argues that the Petition for Writ of Certiorari ("Petition" or "Cert. Petition") should not be granted because the case is not cert-worthy. It offers three reasons for this. First, the University argues that the case merely involves a review of the District Court's discretion in failing to grant Dr. Audain's Motion for Reconsideration. Second, it argues that the controlling law in the D.C. Circuit was already consistent with *Reeves*. Third, the University argues that the case merely involves the application of law to fact and as such is unworthy of this Court's attention. These arguments are without merit.

First, an abuse of discretion standard is wholly irrelevant to this case. This is because the District Court had no discretion in deciding whether it would apply a controlling and intervening case announced by this Court. In his Motion for Reconsideration, Dr. Audain took great pains to point out to the District Court that it was not being asked to reconsider its rulings under Rule 60(b)(6) because that rule deals with reconsideration of a final judgment and the judgments being reconsidered were Rule 54(b) interlocutory judgments and not final judgments. Consistent with the doctrine long-established by this Court in *Sears v. Mackey* 351 U.S. 427, 435 (1956), the District Court was apprised that it did not have the discretion to make final that which was not final. Moreover, the District Court was apprised - that Dr. Audain's Motion for Reconsideration involved a rather straight-forward application of the *Schooner Peggy* doctrine (*United States v. The Schooner Peggy* 5 U.S. (1 Cranch) 103 (1801). Specifically, *Reeves* was

an intervening case announced by this Court that the District Court was obliged to apply to Dr. Audain's case, a pending case.

The District Court would hear none of it. It is for this reason that the court's opinion denying Dr. Audain's Motion for Reconsideration makes reference to Rule 60(b)(6). It is this language that the University cites in its Opposition to Dr. Audain's Cert. Petition. However, the University's citation of the District Court's legal error does not change its character as legal error. Indeed, the University even admitted that the court had committed legal error in treating its interlocutory judgments as final judgments. For, in the very next motion that it filed before the court, a motion to sever its counter claim from Dr. Audain's claims, the University asked the court to enter final judgment in this matter. Accordingly, the University's reliance on *Agostini* and *Browder* in its Opposition (p. 9) are thoroughly inapposite because those cases deal with Rule 60(b)(6) (post-final judgment) relief and that is not the relief that was sought in this case. "Extraordinary circumstances" (*Id*) were not required for the District Court to apply *Reeves*. An application of the District Court's discretion was not involved and this Court is not being asked to review such an application of discretion.

What *is* being respectfully requested of this Court by Dr. Audain, consistent with Rule 10 c) of the Court is that it exercise its supervisory power over the lower courts to reign in a lower court which by its own language refuses to adopt standards of law announced by this Court. Rule 10 c) is of course the logical and statutory counterpart of the *Schooner Peggy* doctrine for if, as the doctrine announces, the lower courts must adopt the standards announced by this Court, then it follows that this Court will reverse them when they fail to do so. Certainly, there is no issue, and the University does not suggest that there is one, as to the continued vitality of the *Schooner Peggy* doctrine in the modern jurisprudence of this Court. See e.g., *Miller v. French* 530 U.S. 327, 344 (2000) (citing *Schooner Peggy* for the proposition that lower courts "must decide according to existing laws."); *Lawrence v. Chater*

516 U.S. 163, 180 (1996, Scalia, J. dissenting) (citing *Schooner Peggy* for the proposition that intervening law "must be obeyed.")

Second, the University argues that cert should be denied here because *Aka* was the controlling case in the D.C. Circuit at the time that the District Court's summary judgment was affirmed and *Reeves* was consistent with *Aka*. Assuming *arguendo* that this is true then the University has happened upon the precise argument why cert *should* be granted in this case. For, here we have a District Court which by the very language in its opinion denying Dr. Audain's Motion for Reconsideration, invokes a standard of actual discrimination in violation of the standard announced in its own circuit and by the Supreme Court. If the circuit court refuses to act, then it is precisely in this context that this Court is called upon to exercise its supervisory power over both lower courts.

Yet the reality of this case, as made clear by footnote 3 of Judge Hogan's opinion of June 25, 1998 (Cert. Pet. at 24a) is that *Aka* was pending at the time of his opinion. Judge Hogan was the judge subsequently reversed by *Aka*. The standard requiring proof of actual discrimination in discrimination cases that he applied in Dr. Audain's case was precisely the standard reversed in *Aka*. *Reeves* removed any doubt whatsoever as to the inapplicability of such a standard. On the basis of *Reeves* therefore, Judge Hogan was asked to reconsider his June, 1998 opinion. As made clear by Dr. Audain's Cert. Petition (p. 12) Judge Hogan refused to do so. This Court is being asked whether Judge Hogan invoked a discrimination standard in 1998 that was overruled in *Reeves*. It is clear that he did. That the Circuit Court refused to note this does little to alter that reality.

Finally, the University argues that Dr. Audain's case is not cert-worthy because it merely involves a fact-based analysis of the application of the rule of law to Dr. Audain's case. Perhaps Dr. Audain's Cert. Petition was unclear. It bears repeating. *Reeves* is a powerful and unanimous case announced by this Court that a) overrules a standard requiring proof of actual discrimination b) announces a standard that a showing of

pretext is sufficient in discrimination cases, c) affirms a standard requiring that a discrimination plaintiff be given the right of discovery and d) affirms the standards for Rules 50 and 56.

The explicit or implicit standards announced by the District Court in this case violate the four standards just announced or affirmed by this Court in *Reeves*. a) As made clear by footnote 7 of Dr. Audain's Cert Petition, the District Court literally announced and applied a standard that required proof of actual discrimination in discrimination cases. Contrary to the University's contention, not only was *Reeves* "reached" by the District Court, it was explicitly violated because this Court overruled a standard of actual discrimination. b) In invoking a standard of actual discrimination, and in the face of a showing of remarkable pretext (complete with racist remarks by University officials) the District Court announced a de facto standard that says that pretext is *not* enough. c) In significantly abrogating Dr. Audain's right to discovery on the very essence of his discrimination claim and then holding that he had adduced insufficient evidence to support his claim, the District Court announced a de facto standard that states that discrimination plaintiffs may have their rights of discovery abrogated to the point of significant detriment of their discrimination claims. d) The District Court implicitly announced standards that state that judicial silence toward the contract claims of a summary judgment nonmovant and looking at the facts in the light most favorable to the movant in matriculation discrimination cases are appropriate grounds for granting summary judgment. These were the explicit or implicit standards invoked in this case. They violate *Reeves*.

II. THE UNIVERSITY CANNOT SUCCESSFULLY DISTINGUISH THE STANDARD OF REEVES AS CONSTRUED BY THE CASES OF *Blow* AND *Chuang*.

In a vain effort to escape the powerful logic of the case of *Blow v. City of San Antonio* 296 F.3d 293 (5th Cir. 2001), the

University proceeds to mischaracterize the argument that Dr. Audain makes in his Cert. Petition. Nowhere in his petition does Dr. Audain argue that *Blow* asserts that simply establishing a prima facie case automatically creates an issue of material fact. *Blow* answers a remarkably self-evident question: how can one possibly argue that there is no issue of material fact in a case if the judge and the very defendant who seeks summary judgment, disagree on material facts? Those cases will be rare but when they do arise, it is completely consistent with *Reeves* to hold that summary judgment should be denied. As pointed out by Dr. Audain in his Petition, this case is such a case. Employers will not always fire employees because they are no longer qualified to hold their positions. Yet this is precisely what the University argued here: that Dr. Audain was fired because he ceased to be qualified to be an associate professor of law. An issue of material fact was automatically created for the jury when Judge Hogan found that Dr. Audain made out a prima facie case of discrimination and that he was indeed qualified. This is the message of *Blow*. It follows clearly from *Reeves*.

The University saves the discussion of the case of *Chuang v. University of California Davis* 223 F.3d 115 (9th Cir. 2000) for last, as well it should. It is very difficult to imagine a case that is more factually apposite. The venom that must lurk behind the combined events of uttering racist epiteths and physically evicting an employee from their work space, leaves one, well, breathless. The Ninth Circuit had no difficulty in finding that such a combination of events demonstrated a showing of pretext. In attempting to distinguish that case from the present one, the University does two things. First, it conveniently ignores the fact that the very person responsible for evaluating Dr. Audain was guilty of making references to "uppity nigger" in his classroom with the subsequent disenrollment of an African-American student. Second, the University appears to argue that Dr. Audain's physical eviction from his office was somehow justified. Apparently, Dr. Audain's three Masters and three doctoral degrees, as well as the

District Court's finding that he held his position "with distinction" (Cert. Pet. at 3) imply a lack of qualifications sufficient to justify physical eviction from his office. Footnote 8 of the Opposition makes no reference to the record for its assertions because those assertions are invalid. Dr. Audain respectfully requests that the Court ignore them.

III. THE UNIVERSITY MAY HAVE WAIVED ITS OBJECTION TO DR. AUDAIN'S CLAIM THAT HE WAS PREVENTED FROM CONDUCTING DISCOVERY BY FAILING TO OBJECT TO THE APPLICATION OF THE DOCTRINE OF SPOLIATION TO THE CASE AT BAR.

Rule 15, paragraph 2 of the Rules of this Court require that a party object to a "question presented" in its Brief in Opposition and failing to do so, that objection "may be deemed waived unless called to the Court's attention in the brief in opposition." In his Cert. Petition (p. 19) Dr. Audain invoked the doctrine of Spoliation of Evidence in asserting that destruction of material evidence by the University's agents implies that summary judgment should be reversed in this matter. In its Opposition, the University does not appear to object to the applicability of the doctrine for all that it has to say is that the applicability of the doctrine was never raised below. (Opposition, p. 10) The *applicability* of the doctrine therefore stands undisturbed as asserted by Dr. Audain in his Cert. Petition. For, as made clear by this Court, there is no rule that prohibits him from invoking the doctrine for the first time on appeal before this Court. "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any

doubt... or where 'injustice might otherwise result.'" *Singleton v. Wulf* 428 U.S. 106, 121 (1976, citing *Hormel v. Helvering* 312 U.S. 552, 557 (1941)).

In subsequent cases, applying this "case by case" standard, this Court has made clear that it will disallow objections on appeal that were not raised below *at trial*. See e.g., *United States v. Gagnon* 470 U.S. 522, 529 (1985). It follows from all of this that the doctrine of Spoliation of Evidence is properly before the Court. First, there has been no trial in this case. Second, the injustice that would result in allowing the University to prevail on summary judgment under these circumstances is nothing short of palpable. One can only presume that the evidence destroyed by the University's agents must have been very significant to this case to warrant the risk of criminal prosecution by its destruction. Moreover, as made clear by the Cert. Petition (footnote 6), the University actually succeeded in invoking the legal process to forestall an investigation into the destruction of the evidence until the matter became moot by a grant of summary judgment in its favor. Such behavior should not be rewarded.

Parenthetically, the University finds it "absurd" to "argue" that *Reeves* has anything to do with the standard governing discovery (Opposition at p. 10). This is tantamount to objecting to the fact that snow is cold. This is because Dr. Audain did not *argue* that *Reeves* affirms plaintiff's right of discovery, he simply cited the plain language of the *Reeves* opinion to that effect (p. 17 of Cert. Petition). The University's objection in this regard is without merit. Indeed, the University makes much in its Opposition of the argument that Dr. Audain failed to adduce evidence that the reasons offered by the University were pretextual. In his Cert. Petition, Dr. Audain argued that assuming *arguendo* that this is true, then it is true because the University prevented Dr. Audain from conducting discovery of critical evidence that would have shown the University's pretext. In sum, the University's agents probably destroyed the most critical evidence in this case and the University successfully barred discovery of the remaining

critical evidence. It is this University that now comes before this Court to argue that summary judgment should be upheld against Dr. Audain because he has failed to adduce sufficient evidence to support his claim. Unfortunately, such an argument makes a mockery of the jurisprudence of this Court.

IV. THE COURT SHOULD RELY ON DR. AUDAIN'S STATEMENT OF FACTS BECAUSE THE UNIVERSITY'S STATEMENT OF FACTS CONTAINS TOO MANY MISSTATEMENTS OF FACT.

It is an unfortunate dimension of this case that on a motion for summary judgment, the University has departed very far from the objective of stating the facts that are uncontested by the parties. Not only has the University misstated the facts in this matter in its restatement of the facts, it has stated as fact allegations that are not even in the record. Indeed, the Opposition makes no reference to the record as Dr. Audain's Cert. Petition does. Instead, it makes references to tendencious documents previously filed by the University and accepted by the lower courts.

Because these misstatements of fact are legion, only a few examples will be offered here. First, for seven long years, the University has asserted in its documents that Dr. Audain was offerred the opportunity to resign from medical school or be fired. It repeats this assertion again in its Opposition (p. 4). There was no such offer. The record as cited by Dr. Audain, is remarkably clear. The contemporaneous notes taken at the faculty meeting state: "Move to not reappoint, conditional on his ability to resign from Law School. If he resigns, we nullify the nonreappoint vote." App. at 790. Second, the University repeats its often repeated contention that a "written complaint" of sexual harassment was filed against Dr. Audain (Opposition, p. 4). But, as Dr. Audain has made clear (Cert. Pet. p. 4), the sexual harassment adjudication process provides for the filing of

such a formal complaint and it is undisputed that one was never filed against him.

Third, the University continues to state as fact that Dr. Audain had only published one article the two years after his promotion as an associate professor of law in 1991(Opposition, p.3). This proposition is not only untrue but simply cannot be found in the pages cited by the University in its Opposition. Dr. Audain published a law review article in 1992 and another in 1993. App. at 146. Moreover, in its Opposition, the University does not address as it cannot, how a professor with declining scholarly productivity would have more publications than tenured full professors, have 16 manuscripts in process and be recognized by another university as an "outstanding minority scholar." Cert Pet. p. 9. The University's Opposition also fails to explain how a professor with a "decline in... performance" (Opposition p. 3) would garner the highest teaching award at the institution. (Cert. Pet. p. 9).

True, what is at stake in this case is the rule of law and Dr. Audain has no intention of trying to convert this Honorable Court into a jury. However, it would seem that there are some things that a lawyer should never leave unaddressed. Most would agree that a misstatement of facts and the statement of facts that are not even in the record, particularly on summary judgment, is high on the list of such things. Dr. Audain therefore respectfully requests that the Court rely on his statement of facts with their references to the record for an accurate statement of the facts in this case.

CONCLUSION

Who will police the police? Judges and law professors rank high on the list of those who are entrusted to protect the integrity of our legal system. The prospect of law professors knowingly and furtively going about destroying evidence in a litigation is admittedly a very disturbing prospect. However, it is not a prospect that can be adequately addressed through summary dispositions, ignored facts and unpublished legal opinions. As an officer of the court and at great personal cost to himself, for the past seven years Dr. Audain has refused to "go gently into that good night." He now respectfully requests that this Honorable Court do substantial justice in this case by reversing the lower courts and reopening discovery in this matter.

Respectfully submitted,
H. Vincent McKnight, Jr. Esq.
2000 L Street, N.W.
Suite 400
Washington, D.C. 20036
Counsel for Petitioner &
Counsel of Record